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No. 90-1899

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION *

STATEMENT OF THE CASE

As this Court has noted, the Public Utility Regulatory Policies Act of 1978 (PURPA or Act) was designed "to increase the utilization of cogeneration and small power production facilities," *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 417 (1983), and to enhance the efficient generation of

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* Pursuant to Sup. Ct. R. 29.1, a list of subsidiaries of Union Carbide Corporation is set forth in the Appendix hereto.

energy. *See Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 750 (1982). As part of this legislative package, Congress attempted to eliminate impediments to the country's full realization of the potential of cogeneration. One such impediment removed by Section 210 of PURPA, 16 U.S.C. § 824a-3, was the likely refusal of electric utilities (such as petitioner) to sell back-up power to entities involved in cogeneration, or to purchase power that is surplus to a cogeneration project. *See* 16 U.S.C. § 824a-3(a). *See also Mississippi*, 456 U.S. at 750-51; *American Paper Institute*, 461 U.S. at 418-23.

Nowhere in PURPA did Congress elaborate on the term "facility." [1] To the extent that there is a debate over the meaning of that term, "Congress has explicitly left a gap for the agency to fill" (*Chevron*,[2] 467 U.S. at 843),[3] by broadly delegating to the Federal Energy Regulatory Commission (FERC or Commission) the authority to "prescribe . . . such rules as it determines necessary to encourage cogeneration. . . ." 16 U.S.C. § 824a-3(a), reproduced at App. 77a-78a.[4]

This case arises from a joint application filed by Union Carbide Corporation and Fina Oil and Chemical Company for certification of their cogeneration project, known as

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[1] PURPA does define the terms "cogeneration facility" and "qualifying cogeneration facility" (*see* 16 U.S.C. §§ 796(18) and 824a-3(l), but those definitions relate to technical aspects of energy production, ownership criteria, and size, fuel use, and efficiency requirements (which are within FERC's discretion to prescribe), and they do not shed any light on what the term "facility" is intended to mean.

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[3] *See also Pauley v. Bethenergy Mines, Inc.*, 59 U.S.L.W. 4778, 4782 (U.S. June 24, 1991); *Sullivan v. Zebley*, 110 S. Ct. 885, 890 (1990).

[4] References herein to "App." are to the Appendix to the Petition for a Writ of Certiorari (Petition).

"Fin-Lin," as a "qualifying facility" (QF) under PURPA. This application was contested by Gulf States Utilities Company (Gulf States), the petitioner here. After a full hearing, the Commission certified Fin-Lin as a QF, over the objection of Gulf States, which had argued, among many other things, that the term qualifying facility could not be applied to the Fin-Lin project. On initial appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals held, in *GSU I*,[5] that the Commission had not adequately explained its conclusion that the Fin-Lin cogeneration project qualified for QF status, and remanded the case to FERC for further consideration. *See* App. 56a-57a. On remand, the Commission, in a well-reasoned order (and on rehearing of that order), again reached the conclusion that certification should be granted. In *GSU II*,[6] the Court of Appeals, consistent with the teaching of this Court in *Chevron* and its progeny, found the agency's explanation sufficient, and rejected petitioner's theory that the term facility is incapable of having the meaning given to it by the agency.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO ISSUE WARRANTING ISSUANCE OF THE WRIT.

None of the circumstances identified by this Court as warranting the grant of a writ of certiorari is present here. This Court has expressed the view that review of Commission orders is "primarily the task of the courts of appeals," *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974), and that the Supreme Court's "'authority is essentially narrow and circumscribed.'" *Id.*, quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 766

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[5] *Gulf States Utilities Co. v. FERC*, 872 F.2d 487 (D.C. Cir. 1989), reproduced at App. 50a-57a.

[6] *Gulf States Utilities Co. v. FERC*, 922 F.2d 873 (D.C. Cir. 1991), reproduced at App. 1a-7a.

(1968). Where Congress has placed responsibility for review "'in the keeping of the Courts of Appeals,'" "'[t]his Court will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied.'" *Mobil Oil Corp.*, 417 U.S. at 310, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

As shown below, the Court of Appeals did not "misapprehend" or "grossly misapply" the standard of judicial review. Nor did it announce new law, decide an important question of federal law, or make a holding in conflict with any rule of law announced by this Court, or any circuit of the Court of Appeals.

II. THE COURT BELOW DID NOT MISAPPREHEND OR GROSSLY MISAPPLY THE STANDARD OF JUDICIAL REVIEW.

1. Petitioner does not and could not contend that the Court of Appeals applied the incorrect standard in reviewing this case. *Chevron* states the rule of law clearly, and it is familiar to the courts. It requires that the reviewing court determine first "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. Where Congress has not "directly spoken to the precise question," the court must consider whether the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843.

Petitioner's argument is not that the rule was misunderstood by the Court of Appeals, but rather that it was mistakenly applied in this case. This argument is twofold: (a) that the court below did not adequately explain its holding on the *Chevron* issue because it misread its own prior decision in the case; and (b) that the court erred by not holding that the meaning of the term "facility" as used in PURPA is unambiguous, so that the agency charged with the statute's administration was precluded from applying the language of the statute in a

manner consistent with its purpose. Neither contention has any merit.

a. Petitioner's first theory is that the court below somehow improperly applied *Chevron* by mistakenly construing the opinion of a different panel of the same court earlier in the case. Thus, petitioner's real complaint is with the Court of Appeals' application of the law of the case doctrine as applied to the particular facts here—assuredly not an issue warranting a grant of certiorari. The court below observed that the *GSU I* panel had already determined that the term "facility" is not so unambiguous that FERC's interpretation of its meaning was impermissible. The court's observation is fully supported by the record. Had the *GSU I* panel found merit in petitioner's argument that the term "facility" was, on its face, inconsistent with FERC's disposition of the orders below, the court's remand to the Commission to explain its rationale under the *second* prong of the *Chevron* test, would have amounted to an empty gesture; instead, it would have *reversed* those orders. *See GSU II*, App. 4a. This is indeed the practice in the Court of Appeals. There was nothing extraordinary or unusual in the way that the Court of Appeals read its prior decision in the case.[7] Moreover, the Court of Appeals' decision in *GSU I*

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[7] Petitioner's suggestion that the *GSU I* panel did not actually decide whether the term facility was unambiguous seems to derive from the fact that the court's holding was not expressly stated. *See* Petition at 10. To make this argument, however, petitioner has to ignore the prior precedent in the Circuit. In *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988) (*PREPA*), the Court of Appeals had unequivocally held that the "step two" analysis was appropriately undertaken when reviewing FERC's interpretation of the term "facility" as used in PURPA. *See* 848 F.2d at 247. This decision is consistent with other decisions finding that, as applied in other statutes, the term "facility" is not so clear and unambiguous as to preclude deference to the interpretation of the agency charged with administering it. *See, e.g., Mobil Oil Corp. v. EPA*, 871 F.2d 149, 152 (D.C. Cir. 1989); *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412, 414-15 (11th Cir. 1986);

was foreordained by its decision in *PREPA*, which held that the term "facility" as used in the Act does not have a clear and unambiguous meaning. *See* 848 F.2d at 247.

Moreover, the court below did not rely solely upon the precedent established by *GSU I*. Rather, it went a step further and *expressly revisited the issue on its merits*, and reached the same conclusion. *See* App. 4a-5a. If petitioner's argument is really that the court's treatment of the question was not lengthy enough (*see* Petition at 8, 9), petitioner has set forth nothing to support the proposition that a Court of Appeals is required to set forth its analysis of a plain language issue in some requisite detail. The court was not required to set forth an elaborate explanation why the term facility would be interpreted in a manner consistent with the broad purposes of the Act, especially given that the question was squarely resolved in the Circuit by *PREPA*, and was also implicit in the *GSU I* holding.

b. To the extent petitioner addresses directly the agency's authority to apply the statute as it has, petitioner argues that the court below erred by not holding that the term "facility" has a clear and unambiguous meaning, which cannot be squared with the interpretation afforded to it by the Commission and upheld by the Court of Appeals. *See* Petition at 11-13 and n.8. Petitioner's argument is that *Chevron* was not properly followed here because the statute is so clear that the agency could not interpret it as it had, affording the term facility a broad definition which furthered the purpose of the Act. But at the heart of *Chevron* is the proposition that, in the absence of any clear indication that Congress has expressed a contrary intention, the courts are to defer to the agency if its interpretation is reasonable and not inconsistent with the statutory purpose. *See, e.g., Chevron,*

Alabama Power Co. v. Costle, 636 F.2d 323, 396 (D.C. Cir. 1979); *Alabama Power Co. v. Costle*, 606 F.2d 1068, 1077 (D.C. Cir. 1979); *ASARCO Inc. v. EPA*, 578 F.2d 319, 325-26 (D.C. Cir. 1978).

467 U.S. at 842-43. *See also Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991). The issue that was presented below is assuredly not one upon which it might fairly be said that Congress had spoken. Read in context, there is no reason why a facility can only mean a single building or a single site, rather than a single integrated enterprise, working together to produce a single product (even though some aspects of the process are spread apart). Petitioner has not offered any explanation why Congress would want to limit the term facility to a single building or group of buildings, particularly in light of the broad purpose of the Act to encourage cogeneration. The Court of Appeals properly found that no clear and unambiguous congressional intention was evinced to preclude the Fin-Lin venture from being found to be a "facility," and correctly deferred to the agency's interpretation, which is not only reasonable, but which also advances PURPA's goals.

2. Nor is there any basis for petitioner's contention that the court of appeals erred with respect to its holding on the retail sale issue. *See* Petition at 13-14. Petitioner's argument in this regard rests on a fundamental misconstruction of the *GSU I* court's decision. Contrary to the argument set forth in the Petition, the *GSU I* court did *not* "[ask] FERC to explain on remand why the sale of power to Union Carbide for consumption at its isolated plant was not a 'retail sale'" (*id.* at 13). In fact, the court in *GSU I* did not address the retail sale issue at all. There thus could be no "irreconcilable" (*id.* at 14) conflict between the *GSU I* and *GSU II* panels for this Court to resolve.

There is also no basis for petitioner's contention that the court below improperly refused to make a ruling on the merits of the retail sale question. The court simply had no reason to elaborate on its ruling because, consistent with the precedent established in *PREPA*, such a question was premature at the certification stage. App.

3a n.1.[8] The failure of a Court of Appeals to say anything about some argument raised by the petitioner below, does not suggest that the Court of Appeals has thereby created a rule of law, with sufficient precedential value, to warrant this Court's attention. In fact, the contrary is true. The disinclination to elaborate on that particular theory says something about the Court of Appeals' view of the importance of the issue, and prevents the court's disposition of the issue—whatever it might have been—from having any effect beyond this case. Although petitioner says that a more definitive ruling was required because of the views expressed by the Commission's Deputy Solicitor (*see* Petition at 13-14), the mere fact that the Commission may take a view of the impact of QF certification that differs from the court's interpretation, does not change this result, or present any issue appropriate for this Court's review.

3. This case does not present any other issue of importance which would warrant review by this Court. Contrary to petitioner's suggestion, the orders below are not "the first authoritative construction of the scope of the cogeneration program mandated by PURPA." Petition at 15. Rather, as petitioner concedes (Petition at 15 and n.14), the D.C. Circuit's holding in *PREPA* provides critical guidance as to the proper construction of PURPA, as do several earlier opinions of this Court. *See American Paper Inst.*, 461 U.S. 402; *Mississippi*, 456 U.S. 742. Indeed, this case involves, at best, a single narrow issue associated with the application of that Act

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[8] Petitioner's reproduction of footnote 1 of the opinion below contains a typographical error. It should read as follows:

> Petitioner also argues that FERC has violated the Act by implicitly authorizing an actual retail sale of power from Fin-Lin to Union Carbide. In *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243 (D.C. Cir. 1988), however, we said that whether or not that transaction was a retail sale was not properly before us; it should be raised first before the state regulatory agency.

—and no question of law that would warrant this Court's attention.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 11, 1991

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APPENDIX

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LISTING OF SUBSIDIARIES PURSUANT TO SUPREME COURT RULE 29.1

The following is the most current listing of subsidiaries of Union Carbide Corporation (Union Carbide). Excluded are those that are wholly owned by Union Carbide.

Ace Limited
Ace Polymer Company, Limited
ACM Services, Inc.
Agri-Diagnostics Associates
Agromore, Ltd.
Alestra Energy Company
American Acetyls
Andaluza de Gases S. A.
Anidride Carbonica Italia
Argon, S. A.
Arlasa, S. A.
B. H. Gases Comercio e Participacoes Ltda
Baker Cummins Dermatologicals, Inc.
BiTec Southeast, Inc.
Cane Associates Limited d/b/a Welders Supply Company
Carbide Hashim Industrial Gases Company
CARBITALIA S. p. A.
Carbographite Limited
Carburo del Cinca S. A.
Clark Chemical Industry Company, Ltd.
Commercial Alcohols Limited
Commercial Alcohols Reg'd.
Compania Navarra de Oxigeno S. A.
Compressione Gas Tecnici S. p. A.
Concoat Integrated Technologies Limited
DCS Capital Partnership
E.S.A. S. r. L.
ELARC—Equipmentos de Soldagem Eletrica Ltda.
Elektrode Maatskappy Van Suid-Afrika (Eiendoms) Beperk EMSA

Elocar Company
EMBRAL—Empresa Brasileira de Reflorestamento e Agro-Pecuaria Ltda.
Excel Limited
F.R.A.O—Finaziaria S. p. A.
F.R.A.O—Industrie
Ferrygas
Gacesa
Gastronomia Basks
Genesis Systems Group, Ltd.
GenEx, Ltd.
Greenwich Oil Corporation
Hexatec Polymers
Hispano Sueca de Soldadura S. A.
Hokuetsu Kasei (Chemical) Co., Ltd.
Hokuetsu Kasei Shoji (Trading) Co., Ltd.
IGI—Italiana Gas Industriali S. p. A.
Indugas N. V.
International Diagnostic Systems Corp.
Iwatani Industrial Gases, Limited
Iwatani-UCISCO Corporation
IWECO
Keren Limited
Kyowa Shokai Co., Ltd.
Linde de Mexico, S. A. de C. V.
Locatelli Ossigeno S.r.L.
Medigas Canada Inc.
Medigas Homecare Services Lakehead Ltd.
Miami Welding Supply, Inc.
Nepal Battery Company Limited
Niject Service Company
Nippon Unicar Company Limited
Osaka Hokuetsu Kasei Co., Ltd.
Oxigeno del Norte, S. A.
Oxigenus, S. A.
Oximesa, S. A.
Oximinas Ltda.
OXISUD, S. p. A.
Oxygene Rioux Inc.

Parylene Japan K. K.
Petromont and Company, Limited
Petromont Inc. (Management Company)
Poly Pack
Polypropylene Partnership
Quimica Basica, S. A.
R. C. Development Associates Limited Partnership
Rhee (Beheer) B. V.
Rivoira S. p. A.
S. A. Rapidox Gases Industriais Ltda.
S. A. Rapidox Rio Comercio e Participacoes
S. A. White Martins
S. p. A. Societa Emiliana Ossigeno S.E.O.
S.A.C.I. S. p. A.
Saguenay Oxygene (1968) Ltee.
Sankyo Plastics Co., Limited
Seadrift Polypropylene Company
Seoul Cold Air Products Company, Limited
Shanghai Guang Yang Shoes Co.
Shanghai UCC-UOP Molecular Sieve Co., Ltd.
Shawinigan Pipeline Reg'd.
SIAD—Societa Italiana Acetilene e Derivati S. p. A.
Societa Portuguesa del Oxigenio, Lda.
Suzhou Su Hong Craft Shoes Co.
Techno B. N. V.
TECHNOPROJECT IND S.r.L.
Tenngasco Gas Gathering Company
Thermo
Tsuda Wire & Cable
UCAR Carbon S. A.
UCAR Interam/EXXON
Umetco/H-B Limited Partnership
Union Carbide—Atlas Joint Venture
Union Carbide—Hecla Joint Venture
Union Carbide—Rajah Joint Venture
Union Carbide—Taminco Joint Venture
Union Carbide Canada Limited

Union Carbide Comercial Chile Ltda.
Union Carbide Hellas Limited
Union Carbide India Limited
Union Carbide Lanka Limited
Union Carbide Marble Care, Inc.
Union Carbide Mexicana, S. A. de C. V.
Union Carbide Pakistan Limited
Union Gas Company Limited
Union Marine Transport Company
Union Polymers Sdn. Bhd
Union Showa K. K.
United States Welding, Inc.
UOP
UOP Management Services (Saudi Arabia) Ltd.
Visking do Brasil S. A.
Wako Jushi Co., Ltd.
Wellnite Services
Wetmore Welding Supplies Limited
White Martins Administracao e Investimentos Ltda.
World Ethanol Company
Zimbabwe Mining and Smelting Company (Private) Limited